

# THE CASE

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## OF

# CHARLES Earl of BANBURY.

**T**HE Right Honourable *William Knollis*, Created *Lord Knollis* and *Viscount Wallingford*, and Knight of the most Noble Order of the Garter by King *James the First*; and by Letters Patents of the 18<sup>th</sup> of August 2 Car. 1. Created *Earl of Banbury*, To hold to him and the Heirs Males of his Body, with a Clause of *Precedence*, to take place next after *Francis* then Earl of *Westmerland*, and before *Henry* then Viscount *Mandevil*, and afterwards Earl of *Manchester*.

The said Earl (having no Issue by *Dorothy* his first Lady) did, after her decease, take to Wife the Lady *Elizabeth*, eldest Daughter to the Right Honourable *Thomas* late Earl of *Suffolk*, and they had Issue *Edward* Earl of *Banbury*, who dyed without Issue, and *Nicholas* late Earl of *Banbury*.

Some Questions arising in *Parliament 3 Caroli*, upon the Clause of *Precedence* in the Patent of 2 Car. 1. certain Earls did at the King's Request Grant *Precedence* to the then Earl of *Banbury*; but ordered, that he should have that *precedence* during Life only, and not *descendable* to his Heirs.

Earl *William* dyed 25 May 1632.

Earl *Edward*, his Eldest Son, being at the time of his Father's death aged little above five Years, was not summoned to any of the *Parliaments* in time of King *Charles the First*, nor could rightfully claim to be so summoned, being under Age, and so dyed without Issue, as aforesaid.

Earl *Nicholas* being born *January 3. 1630.* did, after his arrival to full Age, sit in *Parliament*, Convened in the Twelfth Year of the late King *Charles the Second*, at the time of His Majesties happy Restoration.

In the *Parliament* summoned in the Thirteenth Year of the late King *Charles the Second*, the said Earl *Nicholas*, having received no Writ of Summons to that *Parliament*, Addressed himself by humble Petition to his said late Majesty, setting forth, in effect, the Matters before expressed, and praying that he might be summoned by Writ to the said *Parliament*, and enjoy the Privilege and *Precedency* granted by the said Letters Patents of King *Charles the First*.

This Petition being by his Majesties Appointment delivered to the House of Peers, by the Lord Great Chamberlain of England, was thereupon by them taken into Consideration, and thereupon referred to the Lords Committees for Privileges, who were upon hearing the Petitioners Counsel, and the Kings Attorney General to make Report thereof.

The said Lords Committees being attended by Counsel and Witnesses on the Petitioners behalf, and also by Mr. Attorney General for the King, it was fully proved, that the said Earl *Nicholas* was born of the Body of the said Countess *Elizabeth*, during the Coverture between her and the said Earl *William*.

Mr. Attorney insisted on an Office by which it was found in 9 *Caroli*, That the said Earl dyed without Issue, and that it was reputed that he so dyed.

Whereunto it was insisted, That by the Common Law of the Land, if the Husband be within the four Seas, and the Wife hath Issue, no proof is to be admitted to prove the Child a Bastard. And Mr. Attorney did admit the Law to be so. And moreover, it was proved *Ex abundanti*, That the said Earl *William* was kind and conversant with his Countess, and of a good state of Health, using to ride abroad Hawking and Hunting, although of great Age.

And by a subsequent Inquisition, found in 17 *Car. primi*, it was found that the said Earl *William* had Issue as aforesaid, (*viz.*) *Edward* the then Earl of *Banbury*, his Son and Heir, &c.

Upon the whole matter the Lords Committees came to this Resolution, after several Attendances to Report their Opinions, (*viz.*)

That *Nicholas* Earl of *Banbury*, being in the Eye of the Law Son to *William* late Earl of *Banbury*, the House should therefore advise the King to send him a Writ to come to Parliament.

That the said Earl ought to have place in the House of Peers, according to the Date of his Patent, and not according to the Tenor of that part thereof, which ranketh him before other Earls Created before him.

After those proceedings, and before any final Determination thereupon, the said Earl *Nicholas* (having no Issue Male by the Lady *Isabella*, Daughter of the Right Honourable the late Earl of *Newport*, his first Wife) took to Wife *Anne* the Daughter of the Right Honourable the late Lord *Sherrard*, and had Issue by her *Charles*, now Earl of *Banbury*, his Eldest Son and Heir, and about years since dyed, leaving the said *Charles* Earl of *Banbury* an Infant under Age.

The said *Charles* Earl of *Banbury* hath not been summoned to any of the Parliaments of his late Majesty King *Charles the Second*, and by reason of his Infancy hath forborn to Claim or Petition for his Right:

But being now of full Age, and not being summoned, as other Peers are, hath humbly Petitioned the House of Peers to consider his Case, and represent the same to the King, to the end he may be relieved according to Right.

The Clause whereby the King granted *Precedence* to Earl *William*, and his Heirs Males, beyond what he would have had by his *Anciency*, and the Date of his Patent, did first occasion the Question touching the enjoyment of his Honour, which perhaps had never been otherwise questioned at all. But admitting the Law therein to be one way or other, the Honour of the Earldom is indubitably descended on *CHARLES* the now Earl of *Banbury*.

And neither the first Inquisition, or any Opinions or Presumptions concurring therewith, or founded thereon, are to be received or regarded in prejudice of the Legal and Rightful Heir, and the standing Rules of Law in Cases of Descent and favour of Legitimation, upon these plain Reasons.

1. The first Inquisition is no Evidence to conclude against other direct proof of the Fact, made in the Case upon Oath before the Lords Committees, of the Birth of Earl *Nicholas*.
2. The second Inquisition is to the contrary, and doth in effect Answer and Avoid the former.
3. By Law, no Proofs or Presumptions whatsoever, ought to be received to Illegitimate Issue born within Lawful Wedlock, while the Parents are both within the Four Seas. And in this Case, there was, besides the second Inquisition, Proof of Actual Kindness and Conversation between the Parents, which the Law would intend, if not proved.
4. By Law, no man ought to be Bastardized after his Death, when he cannot Answer for himself.
5. The Law doth so much favour Legitimation of Issue, That if a Bastard, actually born out of Wedlock, became seized of an Inheritance, and a Descent thereof to be cast on his Issue, even the Right of the Lawful Heir, or Mulier (as the Law Terms it) is thereby barr'd, and therein that Descent, from a mans Issue though Illegitimate, doth differ from others.

The now Earl of *Banbury* is unquestionably descended from Earl *Nicholas*, Actually Legal Heir of Earl *William*, in all Regular Qualifications, and Entitled to all the favourable Presumptions the Law doth afford; And it would be an extraordinary thing, both besides, and contrary to all common Rules of Law and Justice, to oppose a Legal Title, upon pretence and Opinion of Fact, so long since past, and never proved, examined, or brought to Judgment in the Lives of the Parties concerned, when themselves and many other Honourable Personages of their Alliance and Acquaintance might have given Proof and Testimony of their knowledge of many material Circumstances and other things now buried with them, and the very truth whereof is become impossible to be thoroughly discovered and made out.